

Only a small step forward

The shy contribution of the EU-Vietnam Investment Protection Agreement to the ISDS reform

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On June 30th, 2019, the European Union signed a trade agreement and an investment protection agreement with the Socialist Republic of Vietnam. This is the third time the EU has used its exclusive competence in the field of foreign direct investment (FDI) to conclude an investment protection agreement (IPA) vis-à-vis an extra-European country, after CETA's investment chapter and the EU-Singapore IPA.

With this “new generation” of investment treaties, the EU has the chance to contribute to the ongoing reform of investor-state dispute settlement (ISDS), a system which is increasingly attracting legitimacy concerns as its popularity grows. Until now, the EU has been primarily focusing on the weaknesses of the ISDS procedural framework by pushing for the institutionalization of ISDS. This effort resulted in the establishment of the Investment Court System (“ICS”) — a two-tier semi-permanent tribunal where the adjudicators are randomly chosen from tribunal members pre-appointed by the Contracting Parties. This mechanism, designed to replace the traditional ISDS regime, has been incorporated in the [CETA](#) and in the EU-Vietnam Investment protection agreement ([EUVIPA](#)) with virtually no difference.

The lack of due consideration of country specifics in investment negotiations: The case of Vietnam

Except for some variations, the investment agreements the EU has concluded so far are indeed quite similar. Significantly, Jean-Claude Juncker referred to the ICS as a “[template for all EU investment negotiations](#)”. In 2010, the [Commission](#) expressed the inappropriateness of a one-size-fits-all EU model for investment agreements. Yet, nine years and three treaties later, the question arises as to whether the EU is instead shaping its international investment policy around a model treaty. Model-based negotiations benefit policy consistency and help the EU secure its achievements in the ISDS reform. However, it is important that the EU adjusts its policy objectives according to the distinctive features of each negotiating partner and adopts a flexible understanding of the relevant concepts of international investment law when it negotiates with Canada rather than with Vietnam. This is particularly so for the drafting of the more substantive provisions of investment treaties, where the EU is not as progressive as with the procedural ones. As will be shown, the investment agreement with Vietnam would have required more proactive solutions to the concerns over the legitimacy of ISDS system.

Vietnam is a one-party socialist, yet strongly capitalist republic, where the human rights record “remains dire in all areas”, according to [Human Rights Watch](#).

Relevantly to the investment sector, “farmers continue to lose land to development projects without adequate compensation”. In 2018, the Ministry of Planning and Investment held a [conference](#) to celebrate the 30 years of FDI attraction, during which it denounced some enterprises “being not serious in implementing regulations on environmental protection”. Vietnam concluded investment treaties with 45 countries and currently counts [28,954 valid FDI projects](#).

Vietnam’s peculiar background draws attention to two contentious issues at the core of the criticism towards the ISDS regime, namely its potential to prevent policy development by discouraging domestic regulation and the lack of investor obligations in traditional BITs. Before analyzing how the EUVIPA addresses these two concerns and why they are relevant in the case of Vietnam, it is important to bear in mind that sustainable development forms an integral part of the common commercial policy (see CJEU [Opinion 2/15](#)) and that, therefore, the EU is legally obliged to take these problems into account in investment negotiations.

Enough space for public interest?

Emerging economies heavily dependent on FDIs, like Vietnam, are particularly vulnerable to the aforementioned risk of a regulatory chill. They are indeed faced with the challenge of regulating with the fear of an investor challenge or of discouraging new FDIs, necessary for the country’s economic growth. Art. 2.2. EUVIPA addresses this point by reaffirming states’ “right” to regulate to achieve several listed policy objectives (e.g. protection of public health, safety, etc.), even when it could negatively affect investments. By “reaffirming” this right, the Parties recognize a State’s preexisting prerogative, as opposed to conceiving it as an exception to the State’s obligations under the treaty.

Still, the framing of this right in the EUVIPA may be too general to lower the risk of claims or to ensure that the outcome of the case does not entail a reduction of the state’s regulatory capacity. The right to regulate clause should indeed be designed in light of the specific priorities of a state and anticipate the public measures that may be challenged in order to exclude them from the admissible claims. An instance of this approach is Art. 21(3) of [the Southern African Development Community Model Treaty](#) (“Right to Pursue Development Goals”), which refers to measures necessary to address historically based economic disparities suffered by minority groups. Likewise, under Art. 29.5 of the Trans-Pacific Partnership Agreement—a treaty which however never entered into force— a Party could elect to deny the benefits of the investment chapter concerning claims challenging a tobacco control measure, thus shielding itself from such a claim.

In the same vein, due consideration to the state’s responsibility to implement international obligations would have required the inclusion of a “hierarchy” or “supremacy” clause (similar to that of [NAFTA, Art. 104](#)), which is not present in the EUVIPA. These clauses ensure that any international agreement for the protection of the environment, labour standard, or human rights binding on both parties prevails over the EUVIPA in case of inconsistency.

International investment law: Still a one-way system under the EUVIPA

The second criticism towards investment treaties, mentioned above, is that they typically do not address investors' obligations and responsibility. However, the inclusion of investor obligations — especially human rights ones — in investment treaties is particularly crucial in the case of legal systems too weak to regulate foreign corporations' conduct and with dismal human rights records, like that of Vietnam.

EUVIPA hints at investors' conduct only indirectly at Art. 3.27(2). This provision limits the access to the ICS by precluding investors from submitting claims against the host-state if the investment was made through fraudulent misrepresentation, concealment, corruption or other conduct amounting to an abuse of process. In light of the foregoing considerations on human rights in Vietnam, this limitation should have also been applied to investments obtained, established or carried out through human rights violations, or violations of domestic and international law protecting the environment or regulating labour standards. Besides, Art. 3.27 merely constraints investors' right to resort to the ICS, but does not establish liability for illegal corporate conduct. Two policy choices demand consideration in this regard. First, the EUVIPA does not impose obligations on investors. As is well-known, corporate liability for human rights violations cannot be established under international law since there exists no binding international instrument placing human rights obligations on business enterprises. Thus, it is particularly important that investment treaties fill this gap by creating investor obligations. For instance, Art. 18 of the [Morocco-Nigeria BIT](#) requires investors to uphold human rights obligations and Art. 9 of the [Indian Model BIT \(2015\)](#) to respect anti-corruption laws. Again, these clauses would have been appropriate in light of the reports on the respect of human rights in Vietnam and on its corruption record (see the [Transparency International Corruption by country index](#)). Second, EUVIPA does not allow states to bring claims against investors, nor states' counterclaims, now admissible under several agreements. It thus fails to address the concern of the one-sided nature of ISDS. This seems inconsistent with the idea of the ICS as an institution better placed to judge on public policy issues if compared to classic investment arbitration, often said to be biased in favour of investors.

Furthermore, the EUVIPA does not comprise a Corporate Social Responsibility (CSR) clause, imposing the duty on investors to engage in socially responsible practices. Art. 13.14 of the [EU-Vietnam FTA's chapter on Trade and Sustainable Development](#) states that the Parties "may" work together in "promoting corporate social responsibility and accountability, including with regards to the internationally agreed instruments that have been endorsed or are supported by each Party". Art. 13.10 states that the Parties agree to "promote" CSR and lists the possible measures which can be pursued to this end. However, these provisions are directed at the signatory States and not at investors. They are contained only in the free trade agreement, but not in the investment protection one. This suggests that they were not meant to interfere with investment protection under the IPA. Still, such provisions are increasingly frequent in BITs, even if most of them feature a non-binding language (e.g. [Art. 12 of the Indian model](#) and [Art. 24 of the Nigeria-Morocco BIT](#)). The choice to omit such a clause in an investment agreement is questionable, especially when it involves countries that lack solid domestic laws

regulating corporate conducts or have not yet acceded to the relevant international instruments (e.g. Vietnam has not adhered to the OECD Guideline on Multinational Enterprises).

The EU's engagement in the ISDS reform — foremost at the procedural level — is undeniable. Yet, highlighting some elements of the EUVIPA, this post showed that EU's contribution is far from revolutionary. Especially with respect to its substantive provisions, the EU did not sufficiently use its rule-making role to advance the most progressive solutions to the ISDS legitimacy crisis, which Vietnam's peculiar domestic context certainly called for.

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